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3165 PACIFIC HIGHWAY
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Attorneys for Defendant,
SAN DIEGO UNIFIED PORT DISTRICT

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

TRAYLOR BROS., INC., an Indiana
corporation doing business as TRAYLOR
PACIFIC,

Plaintiff,

v.

SAN DIEGO UNIFIED PORT DISTRICT, a
California public corporation,

Defendant.

Case No. 08 CV 1019L JMA

**DEFENDANT SAN DIEGO UNIFIED
PORT DISTRICT'S NOTICE OF
MOTION TO DISMISS FOR FAILURE
TO STATE A CLAIM UPON WHICH
RELIEF CAN BE GRANTED [FRCP
12(b)(6)]; MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT;
REQUEST FOR JUDICIAL NOTICE**

**[NO ORAL ARGUMENT PER LOCAL
RULE]**

DATE: August 18, 2008

TIME: 10:30 a.m.

COURTROOM: 11

DISTRICT JUDGE: M. James Lorenz

MAGISTRATE JUDGE: Jan M. Adler

TO: PLAINTIFF AND ITS ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that on August 18, 2008 at 10:30 or as soon thereafter as
the matter may be heard in Courtroom 11 of the above-entitled court, located at 880 Front

1 Street, Room 4290, San Diego, California, defendant SAN DIEGO UNIFIED PORT
2 DISTRICT (hereinafter "PORT") will move the court pursuant to FRCP 12(b)(6), for an order
3 dismissing parts of plaintiff's Complaint on the following grounds:

4 1. Plaintiff's Third Claim for Relief fails to state a cause of action on which relief can
5 be granted.

6 This motion will be based on this notice and motion, the memorandum of points and
7 authorities filed herewith, the exhibits filed herewith, the request for judicial notice, and the
8 pleadings and papers filed herein.

9 DATED: June 30, 2008

DALEY & HEFT

10
11 BY: s/Neal S. Meyers
12 NEAL S. MEYERS
13 SCOTT NOYA
14 Attorneys for Defendant,
15 SAN DIEGO UNIFIED PORT DISTRICT
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Case No. 08 CV 1019L JMA

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANT SAN DIEGO UNIFIED
PORT DISTRICT'S NOTICE OF
MOTION TO DISMISS FOR FAILURE
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RELIEF CAN BE GRANTED [FRCP
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DISTRICT JUDGE: M. James Lorenz

MAGISTRATE JUDGE: Jan M. Adler

Defendant SAN DIEGO UNIFIED PORT DISTRICT submits the following points and
authorities in support of its motion to dismiss pursuant to FRCP 12(b)(6).

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SUMMARY OF ARGUMENT

Plaintiff TRAYLOR BROTHERS, INC.'s Third Claim for Relief pleads a cause of action for "Violation of Public Contract Code section 7104". As set forth in this motion, there is no support for plaintiff's effort to plead this statute as a private right of action. Accordingly, the Court is requested to dismiss the Third Claim for Relief in its entirety.

2.

STATEMENT OF FACTS

On or about July 28, 2005, plaintiff TRAYLOR PACIFIC (hereinafter "TRAYLOR") and SAN DIEGO UNIFIED PORT DISTRICT (hereinafter "DISTRICT") executed a written construction contract. (Complaint, paragraph 13.) The contract amount was approximately \$16,000,000.00. (Complaint, paragraph 13.) Broadly speaking, the contract involved the demolition and removal of certain existing piers and launch way structures, the dredging and disposal of contaminants, bay sediment, the placement of an engineered cap to encapsulate and contain contaminants buried in the bay floor in and about the former Campbell Shipyard and certain maintenance dredging. (Complaint, paragraph 11.)

In its First Claim for Relief for Breach of Contract, TRAYLOR alleges, among other breaches that DISTRICT breached the contract when it "...fail[ed] and refus[ed] to issue change orders providing TRAYLOR with the extensions and/or additional compensation for extra work necessitated by differing site conditions affecting excavation work performed by TRAYLOR at an elevation at least four feet below the surface upon timely notice from TRAYLOR of the differing site condition as required by California Public Contract Code section 7104". [Complaint, paragraph 20, subparagraph (i)], "forcing TRAYLOR to perform extra work not called for under the contract, including under protest, without affording TRAYLOR the time extensions and/or additional compensation for the reasonable value of the extra work performed under protest by TRAYLOR PACIFIC." (Complaint, paragraph 20,

///

subparagraph (j).) TRAYLOR alleges general, special and consequential damages caused by the breach.¹

In addition to TRAYLOR alleging in the First Claim for Relief the DISTRICT breached the contract by failing and refusing to issue a change order due to differing site conditions as required by California Public Contract Code section 7104, TRAYLOR again alleges the DISTRICT violated "...its contractual and statutory obligations under California Public Contract Code section 7104" (Complaint, paragraph 33), in a separate Third Claim for Relief entitled, "Violation of Public Contract Code section 7104" alleging a list of general and special damages as a result. (Complaint, paragraph 33.)

DISTRICT brings this motion since TRAYLOR's attempt to plead violation of Public Contract Code section 7104 as a statutory private right of action is unsupported by law.

3.

THERE IS NO PRIVATE RIGHT OF ACTION FOR VIOLATION

OF PUBLIC CODE SECTION 7104

(a) Public Contract Code Section 7104:

Quoted in its entirety, California Public Contract Code section 7104, states as follows:

7104. Any public works contract of a local public entity which involves digging trenches or other excavations that extend deeper than four feet below the surface shall contain a clause which provides the following:

(a) That the contractor shall promptly, and before the following conditions are disturbed, notify the local public entity, in writing, of any:

(1) Material that the contractor believes may be material that is hazardous waste, as defined in Section 25117 of the Health and Safety Code, that is required to be removed to a Class I, Class II, or Class III disposal site in accordance with provisions of existing law.

(2) Subsurface or latent physical conditions at the site differing from those indicated by information about the site made available to bidders prior to the deadline for submitting bids.

(3) Unknown physical conditions at the site of any unusual nature, different materially from those ordinarily encountered and generally

¹District has brought a separate FRCP 9(g) motion to strike the special and consequential damage allegations.

1 recognized as inherent in work of the character provided for in the
2 contract.

3 (b) That the local public entity shall promptly investigate the conditions, and if
4 it finds that the conditions do materially so differ, or do involve hazardous
5 waste, and cause a decrease or increase in the contractor's cost of, or the time
6 required for, performance of any part of the work shall issue a change order
7 under the procedures described in the contract.

8 (c) That, in the event that a dispute arises between the local public entity and the
9 contractor whether the conditions materially differ, or involve hazardous waste,
10 or cause a decrease or increase in the contractor's cost of, or time required for,
11 performance of any part of the work, the contractor shall not be excused from
12 any scheduled completion date provided for by the contract, but shall proceed
13 with all work to be performed under the contract. The contractor shall retain any
14 and all rights provided either by contract or by law which pertain to the
15 resolution of disputes and protests between the contracting parties.²

16 This section was enacted in 1989 as a method to allocate certain construction risks
17 between the public entity and contractor as a matter of public policy. (Condon-Johnson &
18 Associates, Inc. v. Sacramento Municipal Utility District (2007) 149 Cal.App.4th 1384.) In
19 Condon-Johnson, the section was used to exclude from jury consideration certain disclaimers
20 the court found inconsistent with 7104 under the narrow and specific facts of that case. (Id.)
21 No case supports its independent use as a private right of action for the recovery of contractual
22 or extra contractual damages, nor does the statute support such an interpretation.

23 **(b) Private Rights of Action:**

24 “Adoption of a regulatory statute does not automatically create a private right to sue for
25 damages resulting from violations of the statute. Such a private right of action exists only if the
26 language of the statute or its legislative history clearly indicates the Legislature *intended* to
27 create such a right to sue for damages. If the Legislature intends to create a private cause of
28 action, we generally assume it will do so “‘directly[,] ...in clear understandable, unmistakable
terms...’.” (Emphasis included.) (Vikco Insurance Services, Inc. v. Ohio Indemnity Company
(1999) 70 Cal.App.4th 55, 62-63, citing, Moradi-Shalal v. Firemans Fund Ins. Companies
(1988) 46 Cal.3d 287, 294-295.)

²This quotation includes some language added to the statute by an amendment in 2006, after the
contract was executed. These additions are not pertinent to this discussion.

For example, lacking clear, understandable, unmistakeable terms, the California Supreme Court found that the comprehensive statutes regulating insurance claims handling do not support a private right of action. (*Moradi-Shalal v. Firemans Fund Ins.*, *supra*, 46 Cal.3d 287.) In *Vikco Insurance*, *supra*, the court held that the violation of a written 120 days notice of termination statute involving written agency or written brokerage contracts did not support a private right of action.

(c) Public Contract Code 7104 Contains No Intent to Create A Private Right of Action:

Public Contract Code section 7104 does not include any language suggesting a legislative intent to create in clear, understandable, unmistakable or any other terms the right to sue for damages under this statute as TRAYLOR pleads in this case. Further, no such intent exists in the legislative history of the statute. Attached as Exhibits "A" and "B".³ Neither the Legislative Counsel's Digest for then Senate Bill No. 1470 as amended (Exhibit "A") or as chaptered (Exhibit "B") describe any such intent.

Absent a statutory basis to assert TRAYLOR's Third Claim for Relief, it must be dismissed.

4.

CONCLUSION

For the reasons stated above, the Court is respectfully requested to dismiss the Third Claim of Relief since it fails to state a claim.

Respectfully submitted,

DATED: June 30, 2008

DALEY & HEFT

BY: s/Neal S. Meyers

NEAL S. MEYERS

SCOTT NOYA

Attorneys for Defendant,

SAN DIEGO UNIFIED PORT DISTRICT

³Port requests the Court take judicial notice of these exhibits pursuant to Federal Rule of Evidence 201.

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

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**REQUEST FOR JUDICIAL NOTICE IN
SUPPORT OF DEFENDANT SAN
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MOTION TO DISMISS FOR FAILURE
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**[NO ORAL ARGUMENT PER LOCAL
RULE]**

DATE: August 18, 2008

TIME: 10:30 a.m.

DEPT: 11

DISTRICT JUDGE: M. James Lorenz

MAGISTRATE JUDGE: Jan M. Adler

Although a court may not normally consider evidence outside of the complaint itself in
ruling on a motion to dismiss under FRCP 12(b)(6), there are limited situations in which a
“court may take judicial notice of facts outside the pleadings.” (*Mack v. South Bay Beer*

1 *Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986) (overruled on other grounds by *Astoria*
2 *Federal Savings & Loan Association v. Solimino*, 501 U.S. 104 (1991).) On a motion to
3 dismiss a court may properly look beyond the complaint to matters of public record. (*Mack*,
4 *supra*, 798 F.2d 1282.) The Court may take judicial notice of the contents of public records.
5 (*MGIC Indemnity Corporation v. Weisman*, 803 F.2d 500 (9th Cir. 1986).) Files and
6 determinations of public agencies are subject to judicial notice. (*Furnari v. Warden*, 218 F.3d,
7 250 (3rd Cir. 2000); *Fornalik v. Perryman*, 223 F.3d 523 (7th Cir. 2000).)

8 Here, defendants respectfully request that the Court take judicial notice of the following
9 records of public agencies:

10 **Exhibit A:** Legislative Counsel Digest, Senate Bill 1470;

11 **Exhibit B:** Chapter, 330 for Senate Bill 1470;

12 **Exhibit C:** Declaration of Maria A. Sanders.

13 Respectfully submitted,

14 DATED: June 30, 2008

DALEY & HEFT

16 BY: s/Neal S. Meyers

17 NEAL S. MEYERS

18 SCOTT NOYA

Attorneys for Defendant,

SAN DIEGO UNIFIED PORT DISTRICT

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Traylor Bros., Inc. v. San Diego Unified Port District
U.S. District Court Southern District of California 08 CV 1019L JMA

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Exhibit B:	Chapter, 330 for Senate Bill 1470;	B4-5
Exhibit C:	Declaration of Maria A. Sanders.	C6-7

AMENDED IN ASSEMBLY JULY 17, 1989

AMENDED IN SENATE MAY 10, 1989

SENATE BILL

No. 1470

Introduced by Senator Campbell

March 10, 1989

An act to add Section 7104 to the Public Contract Code, relating to public works.

LEGISLATIVE COUNSEL'S DIGEST

SB 1470, as amended, Campbell. Public works contracts: change orders.

Existing law contains various criteria and requirements applicable to public works contracts.

This bill would require that any public works contract of a local public entity which involves digging trenches or other excavations that extend deeper than 4 feet below the surface contain a clause which provides: (1) that the contractor is required to notify the ~~owner or owner's representative~~ *public entity* of specified conditions concerning hazardous waste, subsurface or latent conditions or unknown physical conditions, ~~and~~ (2) that the ~~owner, or owner's representative~~ *public entity*, is required to promptly investigate the conditions, and if ~~he or she~~ *it* makes certain findings regarding the conditions, that a change order shall be issued under the procedures described in the contract ~~for issuance of change orders~~, *and (3) that, as specified, in the event a dispute arises between the public entity and the contractor, that the contractor shall not be excused from performance.*

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

(800) 666-1917

LEGISLATIVE INTENT SERVICE



SB 1470

— 2 —

The people of the State of California do enact as follows:

1 SECTION 1. Section 7104 is added to the Public
2 Contract Code, to read:

3 7104. Any public works contract of a local public
4 entity which involves digging trenches or other
5 excavations that extend deeper than four feet below the
6 surface shall contain a clause which provides the
7 following:

8 (a) That the contractor shall promptly, and before the
9 following conditions are disturbed, notify ~~the owner, or~~
10 ~~owner's representative, in writing the public entity, in~~
11 ~~writing~~, of any:

12 (1) Material that the contractor believes may be
13 material that is hazardous waste, as defined in Section
14 25117 of the Health and Safety Code, that is required to
15 be removed to a Class I, Class II, or Class III disposal site
16 in accordance with provisions of existing law.

17 (2) Subsurface or latent physical conditions at the site
18 differing from those indicated.

19 (3) Unknown physical conditions at the site of any
20 unusual nature, different materially from those ordinarily
21 encountered and generally recognized as inherent in
22 work of the character provided for in the contract.

23 ~~(b) That the owner, or owner's representative, shall~~

24 (b) That the public entity shall promptly investigate
25 the conditions, and if he or she it finds that the conditions
26 do materially so differ, or do involve hazardous waste,
27 and cause a decrease or increase in the contractor's cost
28 of, or the time required for, performance of any part of
29 the work; ~~whether or not changed as a result of the~~
30 ~~conditions; that a change order shall be issued under the~~
31 ~~procedures described in the contract for issuance of~~
32 ~~change orders.~~ shall issue a change order under the
33 ~~procedures described in the contract.~~

34 (c) That, in the event that a dispute arises between the
35 public entity and the contractor whether the conditions
36 materially differ, or involve hazardous waste, or cause a
37 decrease or increase in the contractor's cost of, or time
38 required for, performance of any part of the work, the



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SB 1470

1 contractor shall not be excused from any scheduled
2 completion date provided for by the contract, but shall
3 proceed with all work to be performed under the
4 contract. The contractor shall retain any and all rights
5 provided either by contract or by law which pertain to
6 the resolution of disputes and protests between the
7 contracting parties.

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Senate Bill No. 1470

CHAPTER 330

An act to add Section 7104 to the Public Contract Code, relating to public works.

[Approved by Governor September 8, 1989. Filed with Secretary of State September 8, 1989.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1470, Campbell. Public works contracts: change orders.

Existing law contains various criteria and requirements applicable to public works contracts.

This bill would require that any public works contract of a local public entity which involves digging trenches or other excavations that extend deeper than 4 feet below the surface contain a clause which provides: (1) that the contractor is required to notify the public entity of specified conditions concerning hazardous waste, subsurface or latent conditions or unknown physical conditions, (2) that the public entity, is required to promptly investigate the conditions, and if it makes certain findings regarding the conditions, that a change order shall be issued under the procedures described in the contract, and (3) that, as specified, in the event a dispute arises between the public entity and the contractor, that the contractor shall not be excused from performance.

The people of the State of California do enact as follows:

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(2) Subsurface or latent physical conditions at the site differing from those indicated.

(3) Unknown physical conditions at the site of any unusual nature, different materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the contract.

(b) That the public entity shall promptly investigate the

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LEGISLATIVE INTENT SERVICE (800) 666-1917



Ch. 330

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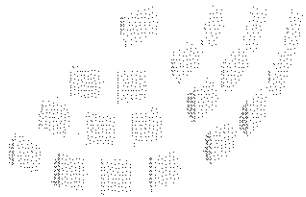
conditions, and if it finds that the conditions do materially so differ, or do involve hazardous waste, and cause a decrease or increase in the contractor's cost of, or the time required for, performance of any part of the work shall issue a change order under the procedures described in the contract.

(c) That, in the event that a dispute arises between the public entity and the contractor whether the conditions materially differ, or involve hazardous waste, or cause a decrease or increase in the contractor's cost of, or time required for, performance of any part of the work, the contractor shall not be excused from any scheduled completion date provided for by the contract, but shall proceed with all work to be performed under the contract. The contractor shall retain any and all rights provided either by contract or by law which pertain to the resolution of disputes and protests between the contracting parties.

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LEGISLATIVE INTENT SERVICE (800) 666-1917





LEGISLATIVE INTENT SERVICE, INC.

712 Main Street, Suite 200, Woodland, CA 95695
(800) 666-1917 • Fax (530) 668-5866 • www.legintent.com

DECLARATION OF MARIA A. SANDERS

I, Maria A. Sanders, declare:

I am an attorney licensed to practice in California, State Bar No. 092900, and am employed by Legislative Intent Service, Inc., a company specializing in researching the history and intent of legislation.

Under my direction and the direction of other attorneys on staff, the research staff of Legislative Intent Service, Inc. undertook to locate and obtain all documents relevant to the enactment of Senate Bill 1470 of 1989. Senate Bill 1470 was approved by the Legislature and was enacted as Chapter 330 of the Statutes of 1989.

The following list identifies all documents obtained by the staff of Legislative Intent Service, Inc. on Senate Bill 1470 of 1989. All listed documents have been forwarded with this Declaration except as otherwise noted in this Declaration. All documents gathered by Legislative Intent Service, Inc. and all copies forwarded with this Declaration are true and correct copies of the originals located by Legislative Intent Service, Inc. In compiling this collection, the staff of Legislative Intent Service, Inc. operated under directions to locate and obtain all available material on the bill.

SENATE BILL 1470 OF 1989:

1. All versions of Senate Bill 1470 (Campbell-1989);
2. Procedural history of Senate Bill 1470 from the 1989-90
Senate Final History;
3. Analysis of Senate Bill 1470 prepared for the Senate
Committee on Governmental Organization;
4. Material from the legislative bill file of the Senate
Committee on Governmental Organization on Senate
Bill 1470;
5. Third Reading analysis of Senate Bill 1470 prepared by the
Office of Senate Floor Analyses;
6. Analysis of Senate Bill 1470 prepared for the Assembly
Committee on Governmental Efficiency and Consumer
Protection;

7. Material from the legislative bill file of the Assembly Committee on Governmental Efficiency and Consumer Protection on Senate Bill 1470;
8. Material from the legislative bill file of the Assembly Republican Caucus on Senate Bill 1470;
9. Unfinished Business and Special Consent analyses of Senate Bill 1470 prepared by the Office of Senate Floor Analyses;
10. Legislative Counsel's Rule 26.5 analysis of Senate Bill 1470;
11. Material from the legislative bill file of Senator William Campbell on Senate Bill 1470;
12. Post-enrollment documents regarding Senate Bill 1470;
13. Press Release #539 issued by the Office of the Governor on September 11, 1989 to announce that Senate Bill 1470 had been signed.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 24th day of June, 2008 at Woodland, California.


MARIA A. SANDERS

DALEY & HEFT
NEAL S. MEYERS, ESQ. (STATE BAR NO. 109625)
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PHONE: (858) 755-5666

Attorneys for Defendant,
SAN DIEGO UNIFIED PORT DISTRICT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

TRAYLOR BROS., INC., an Indiana)	Case No. 08 CV 1019L JMA
corporation doing business as TRAYLOR)	
PACIFIC,)	CERTIFICATE OF SERVICE
)	
Plaintiff,)	
)	
v.)	
)	
SAN DIEGO UNIFIED PORT DISTRICT, a)	
California public corporation,)	
)	
Defendant.)	

I, JANIE WELLE certify and declare as follows:

1. I am over the age of 18 years and not a party to this action.

2. I caused to be served the following document via electronic mail:

**DEFENDANT SAN DIEGO UNIFIED PORT DISTRICT'S NOTICE OF MOTION TO
DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE
GRANTED [FRCP 12(b)(6)]; MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT; REQUEST FOR JUDICIAL NOTICE**

3. Electronic Mail Notice List

The following are those who are currently on the list to receive e-mail notices for this
case:

///

///

1 Robert P Allenby
2 allenby@shlaw.com.matheny@shlaw.com

3 I declare under the penalty of perjury that the foregoing is true and correct.

4 Executed on June 30, 2008 in Solana Beach, California.

5 
6 JANIE WELLE